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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

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No. 310

FRANK O. LOWDEN, JAMES E. GORMAN AND JOSEPH B. FLEMING, TRUSTEES OF THE ESTATE OF THE CHOCTAW, OKLAHOMA & GULF RAILROAD COMPANY,
Petitioners,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES AND BRIEF IN SUPPORT THEREOF.

M. L. BELL,
W. F. PETER,
THOMAS P. LITTLEPAGE,
W. R. BLEAKMORE,
ROBERT E. LEE,
Counsel for Petitioners.

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Petitioners,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES.

To The Honorable Harlan Fiske Stone, Chief Justice of the United States, and Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully show:

I.

Summary Statement of Matter Involved.

This is an action at law instituted by petitioners in the Court of Claims to recover money unlawfully exacted by the respondent in excess of the agreed contract price of

coal deposits in the segregated mineral area of the Choctaw and Chickasaw Nations purchased at public auction pursuant to the provisions of the Act of Congress of February 8, 1918 (40 Stat. 433), authorizing said sale (R. 1). This Act being of some length is attached hereto as an appendix. On May 5, 1941, the Court of Claims rendered its judgment denying recovery upon the merits and dismissing the petition (R. 73, 79, 81).

Petitioners' predecessor, the Choctaw, Oklahoma & Gulf Railroad Company (hereinafter referred to as the Railroad), was the lessee of several developed and undeveloped tracts of coal deposits in the segregated mineral area of the two Indian Tribes. These leases had more than ten years to run at the time the deposits embraced herein were sold at public auction. Each lease provided for the payment of production royalty for all coal produced and also for the payment of a certain amount each year as advance royalty; the advance royalty payments to be credited on production royalty should the lessee develop the tract covered and the production therefrom exceed the amount paid as advance royalty (R. 53, 54, 74).

On December 11, 1918, when the coal deposits were offered for sale at public auction, the Railroad had standing to its credit $20,078.96 advance royalties on its developed leases and $34,400.00 advance royalties on its undeveloped leases (R. 54-55).

With reference to the deposits on which there were leases, Section 4 of the Act of February 18, 1918 (40 Stat. 433) provided that such deposits should be sold subject to all rights of the lessee, that advance royalty paid by any lessee and standing to the credit of said lessee should be credited by the purchaser to the extent of the amount thereof and that no royalty should be paid by the lessee to the purchaser until the credit so given was exhausted at the rate of eight cents per ton. This section of the Act further pro-

vided that the lessee should have the preferential right to purchase the deposits embraced in any lease held by him by taking the same at the highest price offered by any responsible bidder at public auction at not less than the appraised value; and if any lessee became the purchaser of any coal deposits on any undeveloped lease owned by him, then one-half of the advance royalties paid by any lessee on such lease should be credited on the purchase price thereof, and the residue of advance royalties theretofore paid by any lessee should be credited to such lessee on account of any production of coal on any other lease which he may own and operate (R. 55-56, 74).

On September 24, 1918, the Secretary of the Interior promulgated rules governing the sale, the pertinent sections of which read as follows:

> "Section 7. The terms of the sale shall be 20% of the purchase price in cash at the time of the sale, and the remainder shall be paid in four equal annual payments from date of sale, whether or not any coal or asphalt is mined subsequent to the sale. Where mining operations are carried on a certain amount per ton for coal or asphalt mined shall be paid monthly to the Superintendent for the Five Civilized Tribes to be applied on the purchase price as provided by Section 13 of these regulations. All deferred payments shall bear interest at the rate of 5% per annum."
>
> * * * * * * *
>
> "Purchasers shall have the right to pay all of the purchase money or any deferred payment, or any portion thereof, at the time of the sale or at any time before the same is due, interest to be computed to date of receipt of payment" (R. 58).
>
> * * * * * * *
>
> "Section 13. Until full and final payment is made for any tract, leased or unleased, sold under these regula-

tions, the purchaser shall pay, or cause to be paid to the Superintendent for the Five Civilized Tribes, monthly, 8 cents per ton for all coal mined (mine run), and 10 cents per ton for asphalt mined, such payments to be held by said Superintendent to be applied on the purchase price, and upon request of the purchaser may be applied in payment of any installment, when due. Any unused advance royalty to the credit of the lessee under existing leases, shall be paid by said Superintendent, when final payment of the purchase price is made, to the purchaser for the benefit of the lessee under the terms of the lease and the Act of Congress approved February 8, 1918; Provided, however, that if any lessee becomes the purchaser of any coal deposits on any undeveloped lease owned by him, then one-half of the advance royalties paid by any lessee on such lease shall be credited on the purchase price thereof, and any residue of advance royalties heretofore paid by any lessee shall be credited to such lessee on account of any production of coal on any other lease which he may own and operate.

"All royalty paid on coal or asphalt mined subsequent to the date of approval of the sale shall belong to the purchaser, subject to the requirement of a certain amount per ton, as above stated, to be paid to the Superintendent of the Five Civilized Tribes, to be applied on the purchase price, which is to protect the Choctaw and Chickasaw tribes from loss on account of coal removed in case the tract should be forfeited before final payment is made" (R. 59).

On October 10, 1918, a printed advertisement of the sale was issued by the Superintendent for the Five Civilized Tribes which set forth the terms thereof, as follows:

"Terms: Twenty per cent in cash at time of sale and the balance in four equal installments payable in one, two, three, and four years from date of sale, with interest at five per cent per annum on deferred payments. Purchasers can make full payment at time of sale or at

any time before the deferred installments become due'' (R. 60).

The Superintendent for the Five Civilized Tribes also issued an advertisement of the sale in printed pamphlet form which set out the terms thereof, as follows:

> ''Terms: Twenty per cent (20%) of the purchase price at the time of the sale, and the remainder in four equal annual installments, payable in one, two, three, and four years, respectively, from the date of sale. All deferred payments bear 5 per cent (5%) interest per annum from date of sale. All royalties on tracts now under lease, and on any lease made on unleased tracts subsequent to the sale and before final payment, must be paid to the Superintendent for the Five Civilized Tribes and be held by him and paid to the purchasers after full payment has been made or in annual installments in the discretion of the Secretary of the Interior.
>
> ''All sales made shall be upon the express conditions provided for in Section 4 of the Act of Congress approved February 20, 1918'' (R. 61).

At the public auction on December 11, 1918, the Railroad bid in all tracts on which it had leases, both developed and undeveloped. Twenty per cent of the purchase price was paid at the time and the remainder was agreed to be paid in four equal annual installments from the date of sale, the deferred payments to bear interest at the rate of five per cent per annum and to mature and become due at the expiration of four years after the date of sale (R. 55, 58, 60, 61).

The Railroad's bids were not approved by the Secretary of the Interior until August 29, 1919, and between that date and the date the tracts were sold at public auction the Railroad paid production royalties on coal mined from the developed tracts amounting to $35,193.14 (R. 62, 75).

All installments on the purchase price were timely paid in full (R. 62, 63, 64). The Railroad prior to and at the time

of making the final payment demanded and insisted that it be credited on the purchase price with: (1) All production royalties paid between December 11, 1918, and August 29, 1919, amounting to $20,112.39 [1]; (2) all advance royalties standing to its credit on the developed leases on December 11, 1918, amounting to $20,078.96; and (3) the balance of advance royalties standing to its credit on the undeveloped leases on December 11, 1918, amounting to $7,739.75 [2] (R. 55, 62, 65).

In making the final payment on December 11, 1922, the Railroad did so under written protest, demanding the allowance of the above credits and notifying the Superintendent for the Five Civilized Tribes not to disburse the payment in any manner, but to hold the entire payment in his care until such time as the rights of the parties had been finally determined. The Cashier and Special Disbursing Agent in the office of the Superintendent deposited the entire amount of this final payment in his Special Deposit Account with the Treasurer of the United States, termed "Trust Funds," where it now remains pending the final determination of the matters in controversy. This payment was not and has not been paid into the treasury of the United States to the credit of the Choctaws and Chickasaws (R. 64-65, 73).

The claims were finally rejected by the Interior Department on December 12, 1932 (R. 72). Thereafter, on June 27, 1935, the petitioners instituted this suit in the Court of Claims of the United States seeking recovery upon the above claims in the aggregate amount of $47,931.10 (R. 1,

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[1] At the direction of the Secretary, interest paid between the date of sale and date of approval was credited on the purchase price, thereby reducing this claim to $20,112.39 (R. 9, 63, 75).

[2] A portion of the advance royalties on the undeveloped leases was credited on the purchase price, thereby reducing this claim to $7,739.75 (R. 62, 63, 77).

78). On May 5, 1941, the Court of Claims decided that petitioners were not entitled to recover on the merits on their claims and rendered judgment dismissing their petition (R. 73, 79, 81).

II.

Reasons Relied On for the Allowance of the Writ.

1. The decision of the Court of Claims decides a question of substance relating to the construction of the Act of Congress, approved February 8, 1918 (40 Stat. 433), which has not been, but should be, settled by this Court.

2. The decision of the Court of Claims denying petitioners the right to recover the amount of production royalties paid between the date of sale and the date of approval is not in accord with the applicable decisions of this Court on the doctrine of relation. *United States* v. *Anderson,* 194 U. S. 394; *Weyershaeuser* v. *Hoyt,* 219 U. S. 380; *Knapp* v. *Alexander Co.,* 237 U. S. 162; *Lykins* v. *McGrath,* 184 U. S. 169; *Pickering* v. *Lomax,* 145 U. S. 310; *Anchor Oil Co.* v. *Gray,* 256 U. S. 519.

3. The decision of the Court of Claims in denying petitioners the right to recover the amount of the production royalties paid between the date of sale and the date of approval is in conflict with the unreported decision of the United States District Court for the Eastern District of Oklahoma in the case numbered and entitled on its docket, No. 4317 Equity, Condon National Bank of Coffeyville, Kansas, Trustee, plaintiff, *v.* McAlester-Edwards Coal Co., et al., defendants. A certified copy of the applicable parts of the report of the special master in that case and the decree of the court approving the same is on file with the Clerk of this Court.

4. This petition for writ of certiorari is presented under amended Rule 41 of the Revised Rules of this Court, dated March 25, 1940.

WHEREFORE, your petitioners pray that a writ of certiorari issue under the seal of this Court directed to the Court of Claims of the United States, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Court of Claims of the United States had in the case numbered and entitled on its docket, No. 43074, Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of the Estate of the Choctaw, Oklahoma & Gulf Railroad Company, Debtor, plaintiff, *v.* The United States of America, defendant, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Court of Claims of the United States be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated, July 25, 1941.

FRANK O. LOWDEN, JAMES E. GORMAN
and JOSEPH B. FLEMING,
Trustees of the Estate of the Choctaw,
Oklahoma & Gulf Railroad Company,
By M. L. BELL,
W. F. PETER,
THOMAS P. LITTLEPAGE,
W. R. BLEAKMORE,
ROBERT E. LEE,
Counsel for Petitioners.

APPENDIX.

Volume 40, Part 1, United States Statutes at Large, page 433:

Chap. 12. An Act Providing for the sale of the coal and asphalt deposits in the segregated mineral land in the Choctaw and Chickasaw Nations, Oklahoma.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That the Secretary of the Interior is hereby authorized to sell the coal and asphalt deposits, leased and unleased, in the segregated mineral area of the Choctaw and Chickasaw Nations, in Oklahoma, in the manner hereinafter set forth.

Before offering such coal and asphalt deposits for sale the Secretary of the Interior, under such rules and regulations as he may prescribe, shall cause the same to be appraised. Such appraisement, both as to leased and unleased lands, shall be described in tracts to conform to the descriptions of the legal subdivisions heretofore designated by the Secretary of the Interior, and shall be completed within six months after the passage of this Act.

Sec. 2. That the sale of such deposits shall be thoroughly advertised, and shall not later than six months from the final appraisement be offered for sale to the highest bidder at public auction in tracts to conform with such appraisement at not less than the appraised value so fixed, except that isolated tracts of less than nine hundred and sixty acres may be sold separately under like provisions: Provided, That twenty per centum of the purchase price shall be paid in cash, and the remainder shall be paid in four equal annual payments from the date of the sale, and all deferred payments on all deposits sold under the provisions of this Act shall bear interest at the rate of five per centum per annum, and shall mature and become due before the expiration of four years after the date of such sale.

Sec. 3. That immediately after the expiration of one year after the coal and asphalt deposits shall have been offered for sale, or forfeited for nonpayment under the terms of

the sale, the Secretary of the Interior, under rules and regulations to be prescribed by him, shall readvertise and cause to be sold to the highest bidder at public auction, in tracts to conform to the descriptions of the legal subdivisions heretofore designated by the Secretary of the Interior, and at not less than said appraised value, retaining the right to reject any or all bids, all coal and asphalt deposits remaining unsold and all coal and asphalt deposits forfeited by reason of such nonpayment of any part of the purchase price: Provided, That at the expiration of six months thereafter the Secretary of the Interior may again readvertise and offer the same for final sale to the highest bidder at public auction, upon such terms as he may prescribe and at such valuation, independent of the appraised value, as he may fix.

Sec. 4. That such deposits of coal or asphalt on the leased lands shall be sold subject to all rights of the lessee and that any person acquiring said deposits of coal or asphalt shall take the same subject to said rights and acquire the same under the express understanding and agreement that the Department of the Interior will cancel and withdraw all rules and regulations and relinquish all authority heretofore exercised over the operation of said mines by reason of the Indian ownership of said property and that said properties thereafter shall be operated under and in conformity with such laws as may be applicable thereto, and that advance royalty paid by any lessee and standing to the credit of said lessee shall be credited by said purchaser to the extent of the amount thereof, and that no royalties shall be paid by said lessee to said purchaser until the credit so given shall be exhausted at the rate of 8 cents per ton mine run, and that the royalty to be paid thereafter by said lessee to said purchaser shall be 8 cents per ton mine run of coal, and that any lessee may, at any time after completion of such sale, transfer or dispose of his leasehold interest without any restriction whatever; and that any lessee shall have the preferential right, provided the same is exercised within ninety days after the approval of the completion of the appraisement of the minerals as herein provided, to purchase at the appraised value any or all of the

surface of the lands lying within such lease held by him and heretofore reserved by order of the Secretary of the Interior and upon the terms as above provided, and shall also have the preferential right, except as herein otherwise provided, to purchase the coal deposits embraced in any lease held by such lessee by taking same at the highest price offered by any responsible bidder at public auction at not less than appraised value; and if any lessee becomes the purchaser of any coal deposits on any undeveloped lease owned by him, then one-half of the advance royalties paid by any lessee on such lease shall be credited on the purchase price thereof, and any residue of advance royalties heretofore paid by any lessee shall be credited to such lessee on account of any production of coal on any other lease which he may own and operate: And provided, That nothing herein contained shall be construed as limiting or curtailing the rights of any lessee or owner of mineral deposits from acquiring additional surface lands for mining operations as provided by the Act of Congress of February nineteenth, nineteen hundred and twelve: Provided further, That no person or corporation shall be permitted to acquire more than four tracts of nine hundred and sixty acres each, except where such person, firm, or corporation has such tracts under existing valid lease.

Sec. 5. That the surface of any segregated coal and asphalt lands in the Choctaw and Chickasaw Nations, in the State of Oklahoma, which may have been, or may be, condemned under the laws of the State of Oklahoma for State penal institutions, or for county or municipal purposes, as authorized by the Indian Appropriation Act approved March third, nineteen hundred and nine, shall be construed to include the entire estate, save the coal and asphalt reserved and existing valid leases thereon: Provided, That the State of Oklahoma shall have the preferential right of purchase, at the appraised value thereof, upon the same terms as apply to other coal and asphalt deposit sales under this Act, all coal and asphalt deposits underlying the surface heretofore purchased by the said State of Oklahoma, for the grounds of the State Penitentiary: Provided, That said coal deposit under said land shall not

be mined by convict labor for the purpose of sale to any private agencies, individual person, or corporation, or to be sold for private or commercial purposes.

Sec. 6. That the Secretary of the Interior be, and he is hereby, authorized to prescribe such rules, regulations, terms, and conditions, not inconsistent with this Act, as he may deem necessary to carry out its provisions and shall establish an office for such purpose at McAlester, Pittsburg County, Oklahoma.

Sec. 7. That when the full purchase price for any property sold hereunder is paid, the chief executives of the two tribes shall execute and deliver, with the approval of the Secretary of the Interior, to each purchaser an appropriate patent, conveying to the purchaser the property so sold: Provided, That the purchaser of any coal or asphalt deposits shall have the right at any time before final payment is due to pay the full purchase price on said coal and asphalt deposits, with accrued interest, and shall thereupon be entitled to a patent therefor as herein provided.

Sec. 8. That there is hereby appropriated, out of any Choctaw and Chickasaw funds in the Treasury not otherwise appropriated, the sum of $50,000 to pay the expenses of appraisement, advertisement, and sale herein provided for, and the proceeds derived from the sales hereunder shall be paid into the Treasury of the United States to the credit of the Choctaws and Chickasaws.

Approved, February 8, 1918.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 310

FRANK O. LOWDEN, JAMES E. GORMAN AND JOSEPH B. FLEMING, TRUSTEES OF THE ESTATE OF THE CHOCTAW, OKLAHOMA & GULF RAILROAD COMPANY,

Petitioners,

vs.

THE UNITED STATES.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The opinion of the Court of Claims of the United States has not been officially reported. It appears at pages 73-79 of the record.

II.

Jurisdiction.

1. The date of the judgment sought to be reviewed is May 5, 1941 (R. 81).

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Sec. 3(b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

3. The petition for the writ is presented under amended Rule 41 of the Revised Rules of this Court, dated May 25, 1940.

III.

Statement of the Case.

A statement of the case containing all that is material to consideration of the questions presented, with appropriate page references to the record, has been made in the petition for the writ herein and such statement is hereby adopted and made a part of this brief.

IV.

Specification of Errors.

1. The Court of Claims erred in holding that petitioners were not entitled to recover the production royalties paid on the developed tracts between the date of sale and the date of approval.

2. The Court of Claims erred in holding that petitioners were not entitled to recover the residue of advance royalties standing to the credit of the Railroad's developed leases on the date it purchased the deposits embraced therein.

3. The Court of Claims erred in holding that petitioners were not entitled to recover the balance of advance royalty standing to the credit of the Railroad's undeveloped leases on the date it purchased the deposits embraced therein.

V.

ARGUMENT.

Summary of the Argument.

Point A. Under the applicable decisions of this Court on the doctrine of relation the petitioners were entitled to

recover the amount of the production royalties paid between the date of the sale and the date of approval.

Point B. The decision of the Court of Claims in denying petitioners the right to recover the amount of the production royalties paid between the date of sale and the date of approval is in conflict with the unreported decision of the United States District Court for the Eastern District of Oklahoma in the case numbered and entitled on its docket, No. 4317 Equity, *Conden National Bank of Coffeyville, Kansas, Trustee, plaintiff*, v. *McAlester-Edwards Coal Co., et al., defendants.*

Point C. The Act of February 8, 1918 (40 Stat. 433), specifically provides that the residue of advance royalties standing to the credit of the Railroad's developed and undeveloped leases on the date it purchased the deposits embraced therein should be credited on the purchase price thereof.

Point A.

Under the applicable decisions of this Court on the doctrine of relation the petitioners were entitled to recover the amount of the production royalties paid between the date of the sale and the date of approval.

The Act of February 8, 1918, gave to the Railroad as lessee the preferential right to purchase the coal deposits embraced in any lease held by it by taking the same at the highest price offered by any responsible bidder at public auction at not less than the appraised value. These developed tracts were sold to the Railroad at public auction on December 11, 1918, and on that date it paid twenty per cent of the purchase price. The deferred payments due in one, two, three and four years, respectively, were paid by the Railroad on or before December 11 in each year. The Act, the regulations and advertisements required that

the Railroad pay twenty per cent of the purchase price on December 11, 1918, and the remainder in four equal annual installments from that date. In addition, the Act, regulations that advertisements authorized and permitted the purchaser to pay the entire purchase price at the time of the sale. It seems apparent from the above that the sale was effective December 11, 1918, and that the Railroad was and is entitled to the production royalties paid by it subsequent to that date.

The deposits were appraised prior to the date of the auction sale and the price which the purchaser bid was based upon the value of the deposits on that date, and not the date of the Secretary's approval. Between the date of the public auction and the date of the Secretary's approval the Railroad paid production royalties in the amount of $35,193.14; and necessarily between those two dates these coal deposits were depleted to the extent of the number of tons of coal represented thereby. No time limit was fixed for the Secretary's approval. In this case the Secretary's approval was not forthcoming until more than eight months after the sale. He could just as well have delayed his approval until the coal deposits were wholly exhausted and their value entirely destroyed.

The doctrine of relation attached to the Secretary's approval and made it operative as of the date the deposits were sold at public auction. The Railroad had the preferential right to purchase these coal deposits, and in order to give effect to this, according to the spirit of the Act of Congress, it must be held that when it fulfilled the conditions imposed upon it, and the sale had been approved, this approval related back to the date of the initiatory step for the acquisition of the deposits. *United States* v. *Anderson*, 194 U. S. 394; *Weyershaeuser* v. *Hoyt*, 219 U. S. 380; *Knapp* v. *Alexander Co.*, 237 U. S. 162; *Lykins* v. *McGrath*,

184 U. S. 169; *Pickering* v. *Lomax*, 145 U. S. 310; *Anchor Oil Co.* v. *Gray*, 256 U. S. 519.

POINT B.

The decision of the Court of Claims in denying petitioners the right to recover the amount of the production royalties paid between the date of sale and the date of approval is in conflict with the unreported decision of the United States District Court for the Eastern District of Oklahoma in the case numbered and entitled on its Docket, No. 4317 Equity, Condon National Bank of Coffeyville, Kansas, Trustee, Plaintiff, v. McAlester-Edwards Coal Co., et al., Defendants.

The above unreported case is the only court decision involving the identical question here presented. In that case the court decreed that under the Act of February 8, 1918 (40 Stat. 433), the purchaser was entitled to have the production royalties paid between the date of sale and the date of approval credited on the purchase price. The special master, in his report therein, stated:

> "By reference to the terms of sale we find that the purchaser was required to pay one-fifth of the amount offered, in cash, and the balance in four equal installments, and this balance was to bear interest from date of purchase. Another significant fact is that these lands were appraised prior to sale. The purchaser must necessarily have bid with the view that he would obtain all the coal underlying these tracts. If the property was not his until seven months after the sale, then the rule would also apply if the approval were held up until fourteen months after the sale, and at the end of fourteen months he would only get the coal remaining after having mined and paid royalty for fourteen months, although the interest on the balance of the purchase price had been running for this fourteen months. Carried to its logical conclusion it is reasonable that the purchaser could at the date of the ap-

proval receive no coal and yet four-fifths of the purchase price would be due. It is my conclusion that the approval of the Secretary of the Interior of the sale of this property to the McAlester-Edwards Coal Company related back to and became effective as of the date of sale of same to McAlester-Edwards Coal Company, and therefore the royalty paid by the McAlester-Edwards Coal Company should be applied to the extinguishment of the debt sued for in this cause of action. (See Pickering *v.* Lomax, et al., 145 U. S. 310, 36 L. Ed. 716-19; Lykins, et al., *v.* Mrs. R. McGrath, 184 U. S. 169, 46 L. Ed. 485; Harris *v.* Bell, 254 U. S. 103, 65 L. Ed. 159.)"

(Pages 40-41 of certified copy of report of Special Master in the case of *Condon National Bank of Coffeyville, Kansas,* v. *McAlester-Edwards Coal Company, et al., supra,* on file with the Clerk of this Court.)

The report of the Special Master in this regard was approved and confirmed by the court. (Pages 1, 2-3 of the certified copy of the Court's decree in the case of *Condon National Bank of Coffeyville, Kansas,* v. *McAlester-Edwards Coal Company, et al., supra,* on file with the Clerk of this Court.)

POINT C.

The Act of Congress of February 8, 1918 (40 Stat. 433) specifically provides that the residue of advance royalties standing to the credit of the Railroad's developed and undeveloped leases on the date it purchased the deposits embraced therein should be credited on the purchase price thereof.

Each lease provided that the advance royalties paid thereon should be a credit on royalty should the Railroad develop and operate a mine or mines on the lands leased and the production of such mine or mines exceeded such sums paid as advanced royalties. These advance royalties were

not in the nature of a penalty, but were required as evidence of good faith on the part of the lessee. Each lease was a separate contract and the advance royalties standing to the credit of one lease could not be credited upon production royalties on any other lease. The Railroad had the right at any time during the term of the leases to produce coal in such quantities that the production royalties thereon would absorb the advance royalties it had theretofore paid. This was a vested right of which it could not be deprived without its consent. These leases had more than ten years to run when the Railroad purchased the coal deposits covered thereby. In recognition of the rights of the lessees to these advance royalties, Congress provided in Section 4 of the Act of February 8, 1918 that they—

> "shall also have the preferential right, except as herein otherwise provided, to purchase the coal deposits embraced in any lease held by such lessee by taking same at the highest price offered by any responsible bidder at public auction at not less than appraised value; and if any lessee becomes the purchaser of any coal deposits on any undeveloped lease owned by him then one-half of the advance royalties paid by any lessee on such lease shall be credited on the purchase price thereof, and any residue of advance royalties heretofore paid by any lessee shall be credited to such lessee on account of any production of coal on any other lease which he may own and operate."

This provision of the Act is free of ambiguity and its meaning clear and definite. Having exercised its preferential right to purchase all developed tracts embraced in the leases held by it, the Railroad was entitled to have the residue of advance royalties theretofore paid on one developed lease credited to it on account of production royalties on any of its other developed leases and the amount thereof applied on the purchase price of the latter. The Railroad

having also exercised its preferential right to purchase all undeveloped tracts embraced in the leases held by it, it was entitled to have one-half of the advance royalties thereon credited on the purchase price thereof and the remaining one-half thereof credited to it on account of production on any of its developed leases and the amount thereof applied on the purchase price of the latter.

These were the only means by which the Railroad could become entitled to receive credit for the full amount of the advance royalties on its developed and undeveloped leases. It was the purpose of Congress to promptly dispose of all tribal property belonging to the Choctaws and Chickasaws and bring to an end their tribal relationship. The Act authorized and contemplated the sale of all coal deposits in the segregated mineral area of the two tribes. The Act could not affect existing leases unless and until there was a sale of the deposits embraced therein. Should the lessee purchase his leased tracts he was given definite preferential rights, and should an outsider purchase such tracts definite terms and conditions were imposed upon such purchaser. Had anyone other than the Railroad purchased these leased tracts, or any of them, these advanced royalties could not have been "credited to such lessee on account of any production of coal on any other lease which he may own and operate." In the event anyone other than a lessee purchased a leased tract, the Act provided "that advance royalty paid by any lessee and standing to the credit of said lessee shall be credited by said purchaser to the extent of the amount thereof." This provision of the Act required such purchaser to credit to the lessee the advance royalties standing to the credit of the purchased lease, and that lease only, but it did not require such purchaser to credit the lessee on account of production from the purchased lease with the advance royalties standing to the lessee's credit on some other lease.

In order to receive the credit for the residue of advance royalties on a developed or undeveloped lease, the lessee must of necessity purchase other tracts upon which he held leases. The residue of advance royalties could then be credited to the lessee on account of the production of coal on one of the other leases purchased by him, and in turn, credited on the purchase price on the tract from which the coal was produced.

The decision of the Court of Claims is contrary to the paramount purpose of Congress in enacting this legislation, i. e., the sale of all coal deposits. Under the Court of Claims' interpretation an outsider would not have purchased any of the Railroad's leased tracts for the reason that the Railroad, during the life of its leases, could have applied the entire amount of the advance royalties on all of its leases against the production of coal on any of its leased tracts purchased by such outsider. Nor would the Railroad have purchased its leased tracts for, if it had done so, it would have forfeited all the advance royalty standing to its credit. Such a construction of the Act as the Court of Claims had placed thereon would have effectively prevented the sale of all leased tracts and frustrated the purpose of Congress. (Hearings before the Committee on Indian Affairs of the House of Representatives on H. R. 12544, Part 3, page 65 *et seq.;* Congressional Record, Vol. 56, Part 1, pages 208-212).

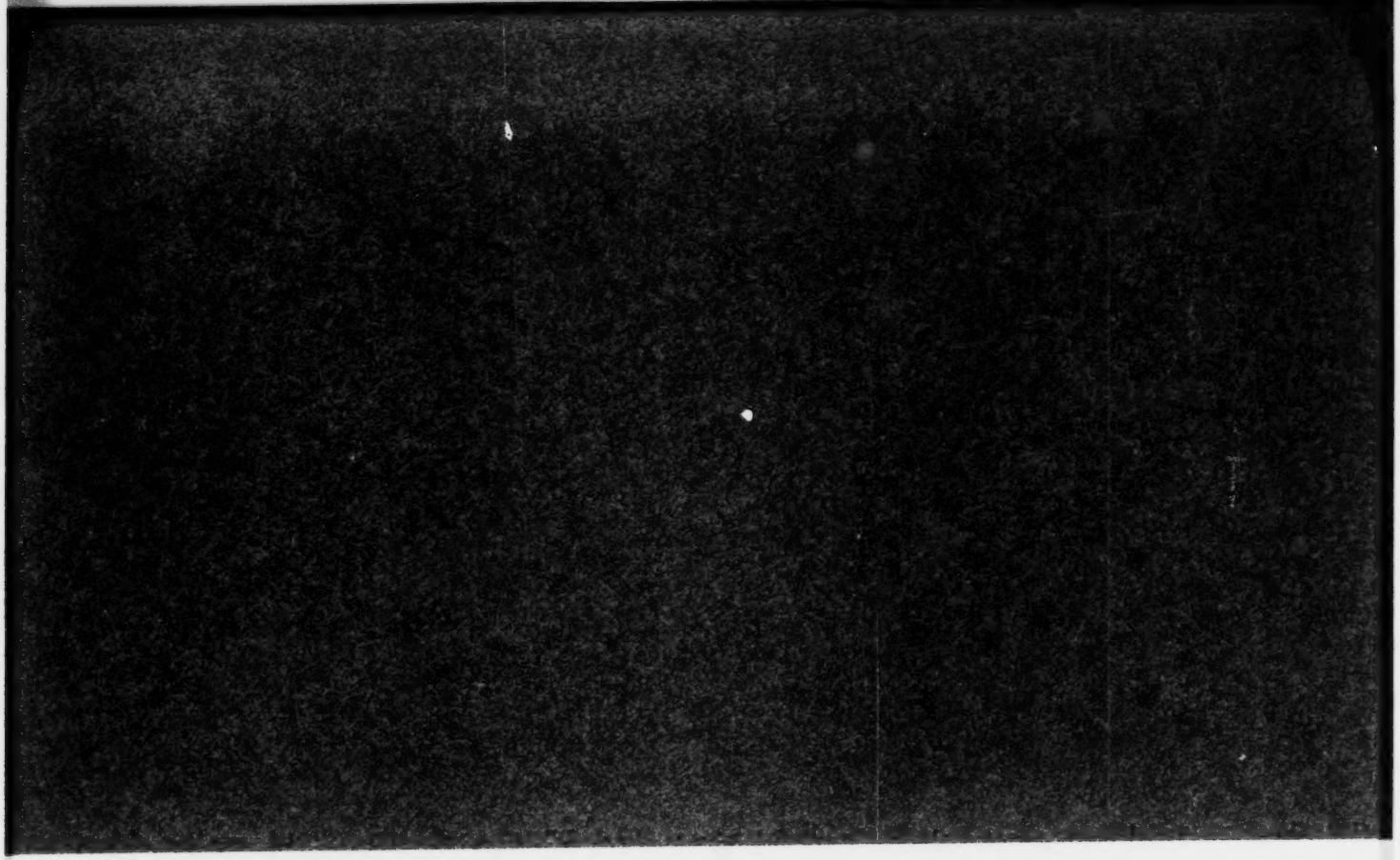
The Act is explicit that the rights and interests of the lessees to the advance royalties standing to their credit should be guaranteed and protected. The Indian Tribes were equally protected in their rights. They were assured that their property would bring a full and adequate price; not less than the appraised value at public auction. It was not the purpose of Congress to enrich the tribes at the expense of the lessees.

Conclusion.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a writ of certiorari, and thereafter reviewing and reversing said decision.

M. L. Bell,
W. F. Peter,
Thomas P. Littlepage,
W. R. Bleakmore,
Robert E. Lee,
Counsel for Petitioners.

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 310

FRANK O. LOWDEN, JAMES E. GORMAN, AND JOSEPH B. FLEMING, TRUSTEES OF THE ESTATE OF THE CHOCTAW, OKLAHOMA & GULF RAILROAD COMPANY, PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 53–79) is not reported.

JURISDICTION

The judgment of the Court of Claims sought to be reviewed was entered on May 5, 1941 (R. 81). The petition for a writ of certiorari was filed July 25, 1941. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTIONS PRESENTED

1. Whether a suit brought in the Court of Claims in 1935 to recover alleged overpayments made in 1922 by a purchaser of coal lands from the Choctaw and Chickasaw Nations pursuant to the Act of February 8, 1918, 40 Stat. 433, is barred by the six-year limitation provision of the Tucker Act.

2. Whether petitioners' cause of action, if any, is within the jurisdiction of the Court of Claims, the United States not having been a party to any of the agreements between the purchaser and the Choctaw and Chickasaw Nations and all monies accruing from those agreements having become the property of the Nations and having been deposited in the Treasury to their account.

3. Whether a lessee of Choctaw and Chickasaw coal deposits, who subsequently purchased the leased premises, is entitled to deduct from the purchase price: (a) production royalties paid on coal mined after the deposits were auctioned under the 1918 Act but before the sale was approved by the Secretary of the Interior; (b) unused advance royalties paid on developed leases; and (c) more than one-half of unused advance royalties paid on undeveloped leases.

STATUTE AND REGULATIONS INVOLVED

The provisions of the Act of February 8, 1918, 40 Stat. 433, are printed in the Appendix, *infra*, pp. 12–16. Pertinent portions of the regulations

promulgated by the Secretary of the Interior under the Act may be found at R. 57–60.

STATEMENT

Petitioners, as trustees of the Choctaw, Oklahoma & Gulf Railroad, sought recovery in the Court of Claims for three items which the Railroad had not been permitted to deduct from its bid price on twenty-one tracts of coal lands purchased from the Choctaw and Chickasaw Nations pursuant to the Act of February 8, 1918, 40 Stat. 433. The relevant facts as found by the Court of Claims (R. 53–73) may be summarized as follows:

In 1899 the Choctaw, Oklahoma & Gulf Railroad leased from the mining trustees of the Choctaw and Chickasaw Nations, for a period of 30 years, 15 developed and 4 undeveloped tracts of coal deposits owned in fee by those tribes, the Railroad agreeing to pay prescribed annual advance royalties against which it was to be permitted to set off production royalties due on coal actually mined (R. 3–4).

In February 1918, Congress authorized the sale of these coal deposits at public auction (subject to the rights of existing lessees), the purchaser to pay 20% cash and the balance in four equal installments. The Act laid down numerous other conditions and authorized the Secretary to prescribe additional terms and conditions not inconsistent with the Act itself (R. 55–57). Detailed regulations for the auction of the coal deposits were pro-

mulgated by the Secretary on September 24, 1918 (R. 57–60). When the auction was held at McAlester, Oklahoma, on December 11, 1918, the Railroad submitted bids covering its 19 leased tracts, as well as 2 other tracts of which it was not the lessee (R. 61). These bids were approved by the Assistant Secretary of the Interior on August 29, 1919 (R. 62).

As the several installments of the purchase price fell due, the Railroad contended that it was entitled to deduct from the purchase price certain royalties which it had theretofore paid as lessee (R. 63–65). Three requested deductions refused by the United States form the subject matter of the present suit.

The first deduction claimed, amounting to $20,112.39, is based upon the following facts: Between the time its bids were submitted on December 11, 1918, and approved on August 29, 1919, the Railroad continued its mining operations under the 1899 leases and paid production royalties amounting to $35,193.14 (R. 62). The Railroad contended that the Secretary's approval of the sale related back to the date the bids were submitted, and that the Railroad should have been permitted to deduct production royalties paid after that date (R. 63). The Secretary, on the other hand, contended that the sale date was August 29, 1919, when the bids were approved, that the Railroad held as lessee until that date, and that the Indians were entitled to

retain royalties paid on coal mined during this interval (R. 66).[1]

The second deduction claimed, amounting to $20,078.96, is based on these facts: The Railroad, between the time it entered into the leases in 1899 and the time when it submitted its bids, December 11, 1918, paid $125,924.64 advance royalties on developed tracts (R. 54). Production royalties on coal mined by the Railroad during the same period amounted to only $105,845.68, leaving a balance of $20,078.96 in advance royalties standing to the Railroad's credit on December 11, 1918 (R. 54–55). The Railroad contended that it should have been permitted to deduct this sum from the bid price (R. 64–65). The Secretary contended that the statute permitted no such deduction (R. 69).

The claim for the third deduction, amounting to $7,739.75, is based on the contention that the Railroad should have been permitted to deduct from the purchase price all advance royalties ($34,400) paid on undeveloped tracts prior to

---

[1] The Department of the Interior has consistently held that interest on unpaid installments should begin to run from the date the bids were approved, and has refused to accept interest tendered for the period which elapsed between the date the bids were submitted and the date they were approved (R. 63). The Railroad recognizes that if its theory of the sale date is accepted, interest should be computed from the earlier date, and accordingly deducts the interest for this interval ($15,080.75) from its claim for production royalties ($35,193.14), leaving a balance of $20,112.39, the amount sued for as item 1 (Pet. 6).

December 11, 1918 (cf. Pet. 6). The Secretary contended that under the 1918 statute the Railroad was entitled to deduct one-half of these royalties and no more; that $17,200.00 had accordingly been allowed when the second installment was paid (R. 62); that an additional $9,460.25 had been inadvertently allowed when the third installment was paid (R. 63); and that the claim for the balance, $7,739.75, was without merit (R. 72).

Upon rejection of these claimed deductions by the departmental officials, the Railroad made its final payment under protest in 1922 (R. 64), receiving its patent from the Indian tribes in 1924 (R. 63–65). In 1927, the Railroad asked that its claims be reconsidered; this was done and the claims were again rejected (R. 68–69). The Railroad persisted and the claims were rejected for a second time in 1928 and again for a third time in 1932 (R. 69, 72). Finally in 1935, after an unsuccessful suit in Oklahoma and the dismissal of a pending suit in the District of Columbia, petitioners instituted the present action in the Court of Claims to recover the alleged overpayments (R. 1).

The Government contended that the Court of Claims was without jurisdiction for two reasons: (1) Because the claims were based on leases and sales which the Railroad had entered into with the Choctaws and Chickasaws, and not on contracts with the United States; and (2) because in any event the claims were not brought within the statu-

tory period prescribed by Congress. Although these pleas were overruled in 1936, the Court, in dismissing the petition and denying recovery on the merits in 1941, expressly stated that it was not deciding whether the defendant was properly subject to suit and whether the statute of limitations had run (R. 79).

ARGUMENT

The judgment of the Court of Claims dismissing the petition and denying recovery is not in conflict with any decision of this Court or of any circuit court of appeals and presents no question of importance. Furthermore, that judgment is plainly correct for each of three reasons:

1. The Choctaw and Chickasaw Nations were the owners in fee of the mineral lands which the Railroad originally leased and subsequently purchased (R. 74). Although these lands were disposed of pursuant to legislation passed by Congress in the exercise of its plenary power over tribal affairs, the United States itself was not a party to the lease and sale agreements, the final patents being issued by the tribal chiefs (R. 53, 65). Even more important, all monies accruing from these transactions became the property of the Choctaws and Chickasaws and were deposited in the Treasury to their credit (R. 54, 57). The decision in *United States* v. *Algoma Lumber Co.*, 305 U. S. 415, 420–422, makes clear that a suit to recover from the United States claims arising out of such

contracts is not within the jurisdiction of the Court of Claims. It therefore follows that the petition was rightly dismissed.

2. Furthermore, whatever cause of action the Railroad may have had, accrued not later than the date of the final payment on December 11, 1922 (R. 64–65). On that date, if not before, the Railroad had the election of paying the amount demanded or of paying the amount it deemed proper and suing to compel a delivery of the patent. The Railroad chose to pay under protest. The present action was not filed until thirteen years later (R. 1), long after the expiration of the six-year period allowed by the Tucker Act. Judicial Code, sec. 156, 28 U. S. C. § 262. The limitation provision being jurisdictional (*Finn* v. *United States*, 123 U. S. 227, 232), the running of the period is not tolled while the claimant seeks to have his claim allowed by an administrative officer, except in those instances where Congress has specified that the claim be first submitted to and rejected by a particular official. *Withers* v. *United States*, 69 C. Cls. 584, 587. Even assuming there to have been such a requirement in this case, it is to be noted that the claims were formally disallowed on November 17, 1927, and again on October 13, 1928 (R. 69), more than six years before this suit was instituted (R. 1). The cause of action was not revived by the Railroad's request in 1932 to have the claims administratively reexamined for a third

time (R. 72). The claims not having been brought within six years after they first accrued, the petition was properly dismissed.

3. Finally, the claims themselves are without merit.

Item 1: The Secretary correctly refused to permit the Railroad to deduct production royalties paid during the interval which elapsed between the date the bids were submitted and the date they were approved. As the court below pointed out (R. 75), the statute itself sheds little light on the problem. The regulations on the other hand are quite significant. Section 13 expressly states that all royalties paid subsequent to the date of approval of the sale should belong to the purchaser (R. 59), thereby implying that royalties paid prior to that date should be retained for the benefit of the Indians. Section 16 likewise declares that after the approval of its bid the purchaser should be furnished a certificate entitling it to possession (R. 60), thus indicating that prior to that date the Railroad was in possession as lessee. These regulations were in force when the bids were submitted and are binding on the Railroad (R. 57). They furnish strong support for the Secretary's contemporaneous ruling that the sale was effective from the date of approval and not before.

It may be noted that when the identical problem was submitted to Attorney General Mitchell in 1931, he too concluded that the purchaser was not

entitled to recover royalties paid on coal mined prior to the date the sales were approved by the Secretary of the Interior. 36 Op. A. G. 473 (1931). Although a contrary conclusion was reached by the Solicitor of the Interior Department in 1924 and by an Oklahoma federal district court in 1935 (Pet. 17–18), there is no conflict of a nature to justify the issuance of a writ of certiorari, particularly since the 1918 statute has been fully executed, no other suits are pending, and any further claims for the recovery of interim royalties are barred by the statute of limitations.

Items 2 and 3: The 1918 Act expressly provides that where a lessee becomes the purchaser of coal deposits on undeveloped leases owned by him, one-half of the advance royalties paid on such leases shall be credited to the purchase price. This explicit provision for the crediting of one-half of the advance royalties paid on undeveloped leases and the omission of a comparable provision with respect to developed leases seems plainly to indicate that Congress did not intend that the purchaser should be allowed to deduct the unused advance royalties standing to its credit on developed leases. 35 Op. A. G. 259, 262 (1927). And since the Railroad has already been allowed to deduct one-half of the royalties paid on undeveloped leases, it has received all the deductions it is entitled to with respect to such leases. 35 Op. A. G. 259, 262 (1927). As the court below pointed out (R. 78–79), the committee

hearings and debates on the bill which became the Act of February 8, 1918, make clear that no credits, other than those which the Railroad has already received, were to be allowed the purchaser of leased deposits acquired under that Act (R. 78).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FAHY,
Acting Solicitor General.
NORMAN M. LITTELL,
Assistant Attorney General.
RICHARD H. DEMUTH,
VERNON L. WILKINSON,
Attorneys.

AUGUST 1941.

APPENDIX

The Act of February 8, 1918, 40 Stat. 433, provides:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.* That the Secretary of the Interior is hereby authorized to sell the coal and asphalt deposits, leased and unleased, in the segregated mineral area of the Choctaw and Chickasaw Nations, in Oklahoma, in the manner hereinafter set forth.
>
> Before offering such coal and asphalt deposits for sale the Secretary of the Interior, under such rules and regulations as he may prescribe, shall cause the same to be appraised. Such appraisement, both as to leased and unleased lands, shall be described in tracts to conform to the descriptions of the legal subdivisions heretofore designated by the Secretary of the Interior, and shall be completed within six months after the passage of this Act.
>
> SEC. 2. That the sale of such deposits shall be thoroughly advertised, and shall not later than six months from the final appraisement be offered for sale to the highest bidder at public auction in tracts to conform with such appraisement at not less than the appraised value so fixed, except that isolated tracts of less than nine hundred and sixty acres may be sold separately under like provisions: *Provided,* That twenty per centum of the purchase price shall be paid in cash, and

the remainder shall be paid in four equal annual payments from the date of the sale, and all deferred payments on all deposits sold under the provisions of this Act shall bear interest at the rate of five per centum per annum, and shall mature and become due before the expiration of four years after the date of such sale.

SEC. 3. That immediately after the expiration of one year after the coal and asphalt deposits shall have been offered for sale, or forfeited for nonpayment under the terms of the sale, the Secretary of the Interior, under rules and regulations to be prescribed by him, shall readvertise and cause to be sold to the highest bidder at public auction, in tracts to conform to the descriptions of the legal subdivisions heretofore designated by the Secretary of the Interior, and at not less than said appraised value, retaining the right to reject any or all bids, all coal and asphalt deposits remaining unsold and all coal and asphalt deposits forfeited by reason of such nonpayment of any part of the purchase price: *Provided,* That at the expiration of six months thereafter the Secretary of the Interior may again readvertise and offer the same for final sale to the highest bidder at public auction, upon such terms as he may prescribe and at such valuation, independent of the appraised value, as he may fix.

SEC. 4. That such deposits of coal or asphalt on the leased lands shall be sold subject to all rights of the lessee and that any person acquiring said deposits of coal or asphalt shall take the same subject to said rights and acquire the same under the express understanding and agreement that the Department of the Interior will cancel and withdraw all rules and regulations and re-

linquish all authority heretofore exercised over the operation of said mines by reason of the Indian ownership of said property and that said properties thereafter shall be operated under and in conformity with such laws as may be applicable thereto, and that advance royalty paid by any lessee and standing to the credit of said lessee shall be credited by said purchaser to the extent of the amount thereof, and that no royalties shall be paid by said lessee to said purchaser until the credit so given shall be exhausted at the rate of 8 cents per ton mine run, and that the royalty to be paid thereafter by said lessee to said purchaser shall be 8 cents per ton mine run of coal, and that any lessee may, at any time after completion of such sale, transfer or dispose of his leasehold interest without any restriction whatever; and that any lessee shall have the preferential right, provided the same is exercised within ninety days after the approval of the completion of the appraisement of the minerals as herein provided, to purchase at the appraised value any or all of the surface of the lands lying within such lease held by him and heretofore reserved by order of the Secretary of the Interior and upon the terms as above provided, and shall also have the preferential right, except as herein otherwise provided, to purchase the coal deposits embraced in any lease held by such lessee by taking same at the highest price offered by any responsible bidder at public auction at not less than appraised value; and if any lessee becomes the purchaser of any coal deposits on any undeveloped lease owned by him, then one-half of the advance royalties paid by any lessee on such lease shall be credited on the purchase price thereof, and

any residue of advance royalties heretofore paid by any lessee shall be credited to such lessee on account of any production of coal on any other lease which he may own and operate: *And provided,* That nothing herein contained shall be construed as limiting or curtailing the rights of any lessee or owner of mineral deposits from acquiring additional surface lands for mining operations as provided by the Act of Congress of February nineteenth, nineteen hundred and twelve: *Provided further,* That no person or corporation shall be permitted to acquire more than four tracts of nine hundred and sixty acres each, except where such person, firm, or corporation has such tracts under existing valid lease.

SEC. 5. That the surface of any segregated coal and asphalt lands in the Choctaw and Chickasaw Nations, in the State of Oklahoma, which may have been, or may be, condemned under the laws of the State of Oklahoma for State penal institutions, or for county or municipal purposes, as authorized by the Indian appropriation Act approved March third, nineteen hundred and nine, shall be construed to include the entire estate, save the coal and asphalt reserved and existing valid leases thereon: *Provided,* That the State of Oklahoma shall have the preferential right of purchase, at the appraised value thereof, upon the same terms as apply to other coal and asphalt deposit sales under this Act, all coal and asphalt deposits underlying the surface heretofore purchased by the said State of Oklahoma, for the grounds of the State penitentiary: *Provided,* That said coal deposit under said land shall not be mined by convict labor for the purpose of sale to any private agencies, individual per-

son, or corporation, or to be sold for private or commercial purposes.

SEC. 6. That the Secretary of the Interior be, and he is hereby, authorized to prescribe such rules, regulations, terms, and conditions, not inconsistent with this Act, as he may deem necessary to carry out its provisions and shall establish an office for such purpose at McAlester, Pittsburg County, Oklahoma.

SEC. 7. That when the full purchase price for any property sold hereunder is paid, the chief executives of the two tribes shall execute and deliver, with the approval of the Secretary of the Interior, to each purchaser an appropriate patent, conveying to the purchaser the property so sold: *Provided,* That the purchaser of any coal or asphalt deposits shall have the right at any time before final payment is due to pay the full purchase price on said coal and asphalt deposits, with accrued interest, and shall thereupon be entitled to a patent therefor as herein provided.

SEC. 8. That there is hereby appropriated, out of any Choctaw and Chickasaw funds in the Treasury not otherwise appropriated, the sum of $50,000 to pay the expenses of appraisement, advertisement, and sale herein provided for, and the proceeds derived from the sales hereunder shall be paid into the Treasury of the United States to the credit of the Choctaws and Chickasaws.

Approved, February 8, 1918.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 310

FRANK O. LOWDEN, JAMES E. GORMAN AND JOSEPH B. FLEMING, Trustees of the Estate of the Choctaw, Oklahoma & Gulf Railroad Company,
Petitioners,

vs.

THE UNITED STATES.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

REPLY BRIEF FOR PETITIONERS

M. L. BELL,
W. F. PETER,
THOMAS P. LITTLEPAGE,
W. R. BLEAKMORE,
ROBERT E. LEE,
Counsel for Petitioners.

AMERICAN PRINTING COMPANY, WASHINGTON, D. C.

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IN THE

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vs.

THE UNITED STATES.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

REPLY BRIEF FOR PETITIONERS

STATEMENT

The Respondent in the foot-note on page 5 of its brief in opposition states "The Department of the Interior has consistently held that interest on unpaid installments should begin to run from the date the bids were approved, and has refused to accept interest tendered for the period which elapsed between the date the bids were submitted and the date they were approved (R. 63)". That statement is inaccurate. On December 11, 1919 the Railroad paid the second install-

ment on the purchase price and included therein interest from the date the deposits were sold at public auction. On April 10, 1920, the Superintendent advised the Railroad that he had been instructed by the Assistant Secretary under date of March 26, 1920, to charge interest only from the date of approval of the sale and that in compliance therewith he had credited on the purchase price the excess payment of interest made December 11, 1919, in the amount of $15,080.75 (R. 62, 63).

ARGUMENT

The Respondent in its brief in opposition urges three propositions, namely: (1) That Petitioners' right of action is barred by the six-year limitation provision of the Tucker Act; (2) that Petitioners' cause of action is not within the jurisdiction of the Court of Claims for the reason that the United States was not a party to the contracts involved; and (3) that the claims are without merit.

In view of the jurisdictional questions raised by the Respondent, Petitioners deem it necessary to make this reply.

PETITIONERS' RIGHT OF ACTION NOT BARRED BY THE SIX-YEAR LIMITATION PROVISION OF THE TUCKER ACT.

The Special Findings of Fact and Opinion of the Court of Claims conclusively establish that the Department of the Interior had these claims under advisement and consideration from December 11, 1922, until December 12, 1932, when the Superintendent advised the Railroad that its claims had been finally rejected (R.

66, 72, 78). This instant suit was instituted within six years from the latter date (R. 1). The Act of Congress directed and ordered the Secretary to make the credits involved herein. Until he finally declined to do so Petitioners' right of action did not accrue. *United States* v. *Fletcher*, 147 U. S. 664; *City of New Orleans* v. *Paine*, 147 U. S. 261; *Slocum* v. *United States*, 35 C. Cls. 485; *Utah Power & Light Company* v. *United States*, 67 C. Cls. 602; *Smith* v. *United States*, 67 C. Cls. 182. Nor did the six-year limitation provision of the Tucker Act commence to run while the claims were under consideration or reconsideration by the Secretary. *Watts* v. *United States*, 82 Fed. (2d) 266; *McKesson & Robbins, Inc.* v. *Edwards*, 57 Fed. (2d) 147; *Jones et. al.* v. *United States*, 5 Fed. Supp. 146; *United States* v. *Helvering*, 89 Fed. (2d) 848.

PETITIONERS' CLAIMS BEING FOUNDED UPON CONTRACTS WITH THE UNITED STATES AND UPON THE ACT OF CONGRESS OF FEBRUARY 8, 1918, (40 STAT. 433) ARE WITHIN THE JURISDICTION OF THE COURT OF CLAIMS.

The Respondent argues that the above proposition has been adversely decided by this court in the case of *United States* v. *The Algoma Lumber Company*, 305 U. S. 415. The facts in the instant case clearly distinguish it from those there under consideration and render the opinion inapplicable.

In the *Algoma* case the decision turned on the question whether certain written contracts for the sale of timber on land of the Klamath Indian Reservation in Oregon, entered into between the Superintendent for

the Klamath Indian School for and on behalf of the Klamath Indians, party of the first part, and the Lumber Company, party of the second part, executed pursuant to the Act of Congress of June 25, 1910, were contracts of the United States upon which suits might be maintained in the Court of Claims. Section 7 of that Act provided that the timber "may be sold under regulations to be prescribed by the Secretary of the Interior", and Section 8 provided that the timber on an Indian allotment "may be sold by the allottee with the consent of the Secretary of the Interior." In the present case the Act of Congress of February 8, 1918, (40 Stat. 433) authorized the Secretary to sell the coal and asphalt deposits involved, and directed him to do so within a specified time, giving the Railroad as lessee the preferential right to purchase the deposits upon which it held leases. This Act of February 8, 1918, does not grant mere permission to the Secretary to sell as did the Act in the *Algoma* case, but commands and directs that he must sell within the time and in the manner prescribed. The Secretary was the medium through which the deposits were sold by the United States. Congress having directed the Secretary to sell, having directed that the deposits be offered for sale within a prescribed time, and having given to the lessees the preferential right to purchase, points conclusively to the fact that the United States, acting through the Secretary, was the vendor.

By the very terms of the written contracts involved in the *Algoma* case, the Klamath Indians were parties thereto. In the present case no written contracts were entered into between the parties. The contracts herein consist of the Act, regulations and advertisements. At

no place in any of the documents comprising the Railroad's contracts is it even inferentially intimated that the Indian Tribes were the vendors, but on the contrary, these documents conclusively establish and specifically name the United States as such. When the coal deposits were sold at public auction on December 11, 1918, the Railroad did not enter into any contract with the Indian Tribes, nor was the sale effected for the Tribes through any agency of theirs. The Secretary effected these sales under the authority vested in him by the Act. Any sale by the Secretary in accord with the provisions of the Act was binding upon the Tribes without their approval or consent.

It was held in the *Algoma* case that the United States did not assume any contractual obligation to purchasers of the timber and no imlpied obligation on its part arose from the performance of its functions as protector of the Indians. In the instant case, however, the Act, regulations and advertisements specifically provide that certain credits shall be given to the lessees who purchased the deposits embraced in leases held by them. Here we clearly have a contractual obligation assumed by the United States to make those credits.

In the concluding paragraph of the *Algoma* case it is stated:

> "Since none of the contracts in suit were contracts or obligations of the United States, it is plain that receipt, by the Treasury of the United States, of payments made under them to the Superintendent for 'the use and benefit' of the Indians, even though made under protest, gave rise to no contract for repayment implied in fact on the part of the United States, and that the cause of action,

> if any, is not within the jurisdiction of the Court of Claims."

An altogether different factual situation exists in the present case. The proceeds from the tribal contracts in the *Algoma* case were deposited in the Treasury of the United States to the credit of the Klamath Indians. In the present case, however, the amount of the last installment, $69,244.26, was paid under protest. This money has never been deposited in the Treasury of the United States to the credit of the Choctaw and Chickasaw Nations, but was taken up in a Special Deposit Account of D. Bruddus, Cashier, and placed on deposit with the Treasurer, where it now remains, subject to his check at any time. (R. 73). This money being on deposit with the Treasurer and not having been placed to the credit of the Tribes is available for the payment of the refund to which Petitioners are entitled. The Respondent is obviously in error in stating that, "Even more important, all monies accruing from these transactions became the property of the Choctaw and Chickasaw Indians and were deposited in the Treasury to their credit. (Page 7 Respondent's Brief in Opposition)".

The Respondent attempts to make a distinction between the Klamath Indians' right of occupancy in the *Algoma* case and the fee simple title of the Choctaw and Chickasaw Indians in the present case. The courts are uniform in holding that Congress has the paramount power to manage, control, or dispose of Indian tribal properties, regardless of whether the Indian Tribes have merely the right of occupancy or fee simple title. *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294; *Ligon* v. *Johnston*, 164 Fed. 670; *United States* v.

Creek Nation, 295 U. S. 103; *Globe Indemnity Company* vs. *Bruce*, 81 Fed. (2d) 143; *United States* v. *Colvard*, 89 Fed. (2d) 312.

Section 4 of the Act of February 8, 1918, declares that, under conditions specified, "if any lessee, becomes the purchaser of any coal deposits on any undeveloped lease owned by him, then one-half of the advance royalties paid by any lessee on such lease shall be credited on the purchase price thereof, and any residue of advance royalties heretofore paid by any lessee shall be credited to such lessee on account of any production of coal on any other lease which he may own and operate." The provision is mandatory, expressed in terms of the right of the lessee purchaser, which is inseparable from the correlative obligation of the United States. The present suit to recover these credits is thus upon claims "founded upon a law of Congress" and is within the jurisdiction conferred upon the Court of Claims. *Dismuke* v. *United States*, 297 U. S. 167; *United States* vs. *Commonwealth Title Insurance & Trust Company*, 193 U. S. 651; *United States* v. *Laughlin*, 249 U. S. 440; *Campbell* v. *United States*, 107 U. S. 407.

PETITIONERS' CLAIMS ARE MERITORIOUS.

This proposition has been fully presented in Petitioners' brief in support of their petition for a writ of certiorari, but in view of Respondent's reference to two opinions of the Attorney General (36 Op. A. G. 473 and 35 Op. A. G. 259), Petitioners feel justified and deem it proper to attach, and they do attach, as Appendixes 1 and 2, the opinions of the Solicitor for the Department of the Interior dated May 28, 1924, and

November 22, 1930, respectively, in which the Solicitor ruled favorably upon claims identical with those here presented.

CONCLUSION

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a writ of certiorari, and thereafter reviewing and reversing said decision.

M. L. Bell,
W. F. Peter,
Thomas P. Littlepage,
W. R. Bleakmore,
Robert E. Lee,
Counsel for Petitioners.

APPENDIX 1

DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
Washington

May 28, 1924.

The Honorable
The Secretary of the Interior.

Dear Mr. Secretary:

You request my opinion in the matter of refunding advance royalties to purchasers of coal and asphalt deposits underlying the segregated coal and asphalt land of the Choctaw and Chickasaw Indians, Oklahoma.

These segregated lands form part of the domain patented in fee March 23, 1842, to these Indians in common pursuant to the treaties of September 27, 1830 (7 Stat., 333), and January 17, 1837 (11 Stat., 573). Under section 21 of the act of June 28, 1898 (30 Stat., 495-503), commonly known as the Atoka agreement, and the act of July 1, 1902 (32 Stat., 541), known as the supplemental agreement, allotments in severalty were made to individual members of those tribes but the coal and asphalt lands approximating some 450,000 acres, were segregated or reserved for the benefit of the Indians in common. Anterior to 1898, however, the tribal officers had entered into a series of leases covering some of these coal and asphalt lands, royalty therefrom being payable at specified rates per ton for the benefit of the tribes at large. These earlier negotiations between the Indians and their lessees were ratified and confirmed to some extent by the Atoka agreement, additional leases were provided for to run for terms of 30 years, royalty being fixed at 15 cents per ton for coal and 60 cents per ton for asphalt with a

proviso under which the Secretary of the Interior could increase or decrease the rate of royalty whenever he deemed it for the best interest of the Indians so to do (30 Stat., page 510). For a limited period the coal operators were required to pay 15 cents per ton royalty on "screened coal" but on protest and after an extensive heading the rate of royalty on coal was fixed at 8 cents per ton "run of mine." The asphalt deposits proved to be such a negligible factor that for the purpose of this discussion they may be disregarded other than to observe that both classes of deposits are controlled by the same legislation and the same underlying fundamental principles, with particular reference to advance royalties the act of 1898, *supra*, provides:

> "All lessees shall pay on each coal or asphalt claim at the rate of one hundred dollars per annum, in advance, for the first and second years, two hundred dollars per annum in advance, for the third and fourth years, and five hundred dollars for each succeeding year thereafter. All such payments shall be treated as advanced royalty on the mine or claim on which they are made, and shall be a credit as royalty when each said mine is developed and operated, and its production is in excess of such guaranteed annual advance payments, and all persons having coal leases must pay said annual advanced payments on each claim whether developed or undeveloped. *Provided, however,* That should any lessee neglect or refuse to pay such advanced annual royalty for the period of sixty days after the same becomes due and payable on any lease, the lease on which default is made shall become null and void, and the royalties paid in advance thereon shall then become and be the money and property of the Choctaw and Chickasaw nations."

The supplemental agreement of 1902, *supra*, sections 56 to 62, inclusive, contemplated that the segregated

coal and asphalt lands including the mineral deposits therein, whether leased or unleased, should be sold within three years from the date of ratification of that act. To this end further leases were prohibited but by the act of April 21, 1904 (33 Stat., 189-209), Congress directed that the leased lands should be withheld from sale until otherwise provided, thus leaving the unleased areas only to be offered for sale. In 1905 an effort was made to dispose of the unleased lands but all bids therefor were rejected by the Secretary of the Interior as being too low. By the act of April 26, 1906 (34 Stat., 137, 142), Congress further directed that all of these segregated lands, both leased and unleased, should be withheld from sale until the existing leases shall have expired (about 1932) "or until otherwise provided by law."

The matter rested thus, legislatively, until 1912 when by the act of February 19 of that year (37 Stat., 67), Congress provided for an appraisement and sale of the *surface* of these lands subject to all rights of the mineral lessees and giving also to those lessees certain preferential rights to purchase part of the surface leased by them at the appraised price; See *McAlester-Edwards Coal Company* v. *Secretary of the Interior* (277 Fed., 573 and 202 U. S., 200). Between the years 1909 and 1916 at least approximately 2,500,000 tons of coal were mined from these lands annually, some 100,000 acres in the aggregate being then covered by 113 leases, all of which, however, were not producing or in operation. At any rate royalty on the coal annually produced at eight cents per ton yielded the Indians about $200,000 per annum. See hearings on H. R. 12544, 64th Congress, which ultimately became the act of February 8, 1918 (40 Stat., 433). The latter act provided for the appraisement and sale of the coal and asphalt deposits in these segregated lands under rules and regulations to be prescribed by the Secretary of the Interior, at not less than the appraised price.

Section 4 of this act reads in part:

"That such deposits of coal or asphalt on the leased lands shall be sold subject to *all rights* of the lessee and that any person acquiring said deposits of coal or asphalt shall take the same subject to said rights and acquire the same under the express understanding and agreement that the Department of the Interior will cancel and withdraw all rules and regulations and relinquish all authority heretofore exercised over the operation of said mines by reason of the Indian ownership of said property and that said properties thereafter shall be operated under and in conformity with such laws as may be applicable thereto, and that *advance royalty paid by any lessee and standing to the credit of said lessee shall be credited by said purchaser to the extent of the amount thereof,* and that no royalties shall be paid by said lessee to said purchaser until the credit so given shall be exhausted at the rate of 8 cents per ton mine run, and that the royalty to be paid thereafter by said lessee to said purchaser shall be 8 cents per ton mine run of coal, and that any lessee may, at any time after completion of such sale, transfer or dispose of his leasehold interest without any restriction whatever; and that any lessee shall have the preferential right, provided the same is exercised within ninety days after the approval of the completion of the appraisement of the minerals as herein provided, to purchase at the appraised value any or all of the surface of the lands lying within such lease held by him and heretofore reserved by order of the Secretary of the Interior and upon the terms as above provided, and shall also have the preferential right except as herein otherwise provided to purchase the coal deposits embraced in any lease held by such lessee by taking same at the highest price offered by any responsible bidder at public auction at not less than appraised value; and if any lessee becomes the pur-

chaser of any coal deposits on any undeveloped lease owned by him, then one-half of the advance royalties paid by any lessee on such lease shall be credited on the purchase price thereof, and any residue of advance royalties heretofore paid by any lessee shall be credited to such lessee on account of any production of coal on any other lease which he may own and operate." (Italics added.)

The mineral deposits underlying these lands were advertised and offered for sale, in accordance with the terms of the foregoing legislation and the regulations promulgated by this Department to carry out the provisions of that act expressly declare:

"Until full and final payment is made for any tract, leased or unleased, sold under these regulations, the purchaser shall pay, or cause to be paid to the Superintendent for the Five Civilized Tribes, monthly, 8 cents per ton for all coal mined (mine run), and 10 cents per ton for asphalt mined, such payments to be held by said Superintendent to be applied on the purchase price, and upon request of the purchaser may be applied in payment of any installment, when due. Any unused advance royalty to the credit of a lessee under existing leases shall be paid by said Superintendent, when final payment of the purchase price is made, to the purchaser for the benefit of the lessee under the terms of the lease and the Act of Congress, approved February 8, 1918; Provided, however, that if any lessee becomes the purchaser of any coal deposits on any undeveloped lease owned by him, then one-half of the advance royalties paid by any lessee on such lease shall be credited on the purchase price thereof, and any residue of advance royalties heretofore paid by any lessee shall be credited to such lessee on account of any production of coal on any other lease which he may own and operate."

Evidently, therefore, upon payment of the purchase price in full the purchaser then becomes entitled to the advance royalty, or more accurately speaking, the unused advance royalty standing to the credit of the tract so purchased. Further, that where a lessee purchased the coal deposits on any undeveloped lease owned by him he thereupon became entitled to credit on the purchase price to the extent of one-half of the advance royalties paid, the remaining half to be credited to such lessee on account of production on any other lease owned by him.

When we analyze the situation behind all this, manifestly the plain intent is that the Indians shall receive full and adequate consideration for their property but at the same time substantial justice shall be done to the lessees. The hearings on the bill last herein referred to clearly shows this. The advance royalties, in effect, simply constitute a deposit to be applied on production as and when had. Forfeiture is not provided for except such as may be found in the proviso reproduced above from the act of June 28, 1898, which obtains only where the lessee neglected or refused to pay the advance royalties as and when due. With such royalties as have heretofore become forfeited, however, we are not here dealing, the question now before me relating to the unused advance royalties standing to the credit of given tracts of land which have been sold and fully paid for. The Indians have heretofore received the appraised price and frequently more than the appraised price (the highest bid price) for both the surface and the coal deposits underlying that surface, and I am unable to see wherein we can now demand for the Indians retention of the advance royalties which Congress has directed to be credited by the purchaser in favor of the lessee to the full extent thereof.

One other point remains to be considered. These deposits were offered for sale and were sold, in the main, at McAlester, Oklahoma, on December 11, 12, 13, and 14, 1918. Owing to unavoidable administrative

and other delays approval of these sales by the Secretary of the Interior was not had in many instances for several months later, notably that of the Kala-Inla Coal Company, purchaser of tract No. 34-B, McAlester district, which sale was not approved until August 29, 1919, the agreed price being $21,420. Under Section 2 of the act of February 8, 1918, *supra*, the purchasers of these deposits were required to pay 20 per cent of the purchase price in cash and the remainder in four equal annual installments "from the date of sale," the deferred payments to bear interest at 5 per cent per annum. Where production was in progress necessarily coal in varying and frequently considerable quantities was being mined and removed from these premises between the date of sale and the date of approval in each case. On this production the usual royalty at 8 cents per ton was demanded and paid as a measure of protection for the Indians in case of default by the purchaser to meet subsequent installments of the purchase price when due. It was first held by the Department that as the sale was not complete until approved by the Secretary of the Interior, the royalty on production between the date of sale and the date of approval belonged to the Indians. On protest by the Kala-Inla Company, however, the Department on December 26, 1922, ruled that the purchaser should be required to pay interest on the deferred payments from date of sale, rather than from the date of approval, and that upon final payment of the purchase price the purchaser then became entitled to a refund of the royalty on the coal removed from the tract between these two dates. I regard the latter as the correct view, which certainly is more in harmony with the letter and intent of section 2 of the act of February 8, 1918, *supra*. This is apparent from a moment's consideration. These deposits were sold as of a given date, the purchaser bought as of that date and on payment of the purchase price in full with interest the purchaser then clearly becomes entitled to the royalty on such deposits as may

have been removed from the premises as purchased subsequent to the date of sale.

Respectfully,

(Signed) JOHN H. EDWARDS,
Solicitor.

Approved: May 28, 1924.

(Signed) F. M. GOODWIN,
Assistant Secretary.

APPENDIX 2

November 22, 1930.

The Honorable
The Secretary of the Interior.

Dear Mr. Secretary:

You have requested my opinion in the matter of the disposition to be made of certain payments made to the Superintendent of the Five Civilized Tribes by the Kali-Inla Coal Company, lessee-purchaser of segregated coal and asphalt deposits underlying Choctaw and Chickasaw Indian lands in Oklahoma during the period from December 11, 1918, date of sale to the company, and August 29, 1919, date of approval of the sale by the Secretary of the Interior. You further request that this question be considered in the light of other considerations, first, the power of the Secretary of the Interior to review and set aside decisions of his predecessors in office in this matter, and second, the hearing which the administrative construction and practice of the Department may have upon the answer to the principal question.

It appears that the deposits in question were leased with the approval of the Secretary of the Interior to the Choctaw, Oklahoma and Gulf Railroad Company on February 18, 1899, for a period of 30 years (leases Nos. 10 and 11). The leases were made and approved under authority of section 29 of the act of June 28, 1898 (30 Stat. 495), and the rate of royalty on coal was ultimately fixed at eight cents per ton "run of mine." The rate of royalty on asphalt was fixed at ten cents per ton but with this product we are not much concerned due to its negligible value. By assignments duly approved by the Secretary of the Interior the leases were transferred in part to the Kali-Inla Coal Company.

December 11, 1918, while the leases were still in effect, the Kali-Inla Coal Company purchased at public auction sale, subject to the approval of the Secretary of the Interior, for a consideration of $21,420, the coal and asphalt deposits embraced in its leasehold, such sale being had under authority of the act of February 8, 1918 (40 Stat. 433), and in conformity with regulation prescribed by the Secretary thereunder. The purchase price under section 2 of the act was payable 20 per cent in cash and the balance in four equal annual installments from the date of sale, the deferred payments to bear interest at five per cent per annum and to mature and become due before the expiration of four years after the date of sale.

The act further provided (section 7):

That when the full purchase price for any property sold hereunder is paid, the chief executives of the two tribes shall execute and deliver with the approval of the Secretary of the Interior, to each purchaser an appropriate patent, conveying to the purchaser the property so sold: *Provided*, That the purchaser of any coal or asphalt deposits shall have the right at any time before final payment is due to pay the full purchase price on said coal and asphalt deposits, with accrued interest, and shall thereupon be entitled to a patent therefor as herein provided.

The sale was not approved by the Secretary of the Interior until August 29, 1919, and in the interval the lessee-purchaser continued to make the payment of eight cents per ton on coal mined, the rate specified in the leases, such payments amounting to $1,683.65. This amount the company contends belongs to it rather than to the Indians and insists that it be credited upon the purchase price. If this be done, the company will have completed its contract of purchase and would now be entitled to patent. The question thus presented has been before the Department on various occasions in the past and the record discloses a series of depart-

mental decisions somewhat remarkable for their inconsistency.

It was first held on December 10, 1919, that the sale of any tract is not complete until approved by the Secretary of the Interior and any royalty due under the leases prior to the date of such approval belongs to the Choctaw and Chickasaw Tribes, and any amounts due subsequent to that date belong and should be paid by the lessee to the purchaser. Consistent with this holding, it was further held on March 26, 1920, that the purchaser should be charged interest on deferred payments from the date of approval of the sale rather than from the date of sale. December 26, 1922, however, the Department, upon application of the Kali-Inla Company, reversed and modified the former holdings and ruled not only that the interest on deferred payments should be collected from the date of sale but that the royalties on coal mined between the date of sale and approval thereof should be credited to the purchaser on final payment of the purchase price. The latter holding was upheld as in conformity with the applicable law by the then Solicitor for this Department in an opinion rendered May 28, 1924 (M 7316). Notwithstanding these rulings, final adjustment with the Kali-Inla Company was not had for the reason apparently that there were pending other claims of a like nature involving much larger amounts, and in addition attorneys for the Choctaw and Chickasaw Tribes actively opposed any settlement along the proposed lines. Finally, on December 10, 1928, the Department vacated the decision of December 26, 1922, and disallowed the claim of the Kali-Inla Company to the payments made between the date of sale and date of approval thereof, and on December 22, 1929, served notice of intention to cancel the sale unless payment of the amount claimed to be due was made within the time specified.

With this preliminary statement we turn first to the question of the authority of the Secretary of the In-

terior to reconsider and set aside the decision last mentioned, a matter upon which, fortunately, we are not without guidance in judicial decisions. To be sure the adjudicated cases in many instances relate to the action of the Secretary of the Interior upon public land matters, but inasmuch as the powers of the Secretary in the administration of the affairs of the Indians are substantially the same as those held by him over the disposition and sale of the public lands (*Knight* v. *United States Land Association*, 142 U. S. 161, 182), his reviewing authority in both classes of cases is controlled by the same underlying fundamental principles. See *Knight* v. *Lane* (228 U. S. 6).

Under prevailing decisions of the courts, finality precluding reexamination attaches to decisions of the Secretary of the Interior upon matters arising within his jurisdiction where there is involved the doing of some act such as the issuance of a final fee simple patent which when done terminates the jurisdiction of the Department. *Noble* v. *Union River Logging Railroad Company* (147 U. S. 165); *Lane* v. *Watts* (234 U. S. 525); *West* v. *Standard Oil Company* (278 U. S. 200, 218); *Larkin* v. *Paugh* (276 U. S. 431). But as stated in *Brown* v. *Hitchcock* (173 U. S. 473, 476), "Until legal title to public land passes from the Government, inquiry as to all equitable rights comes within the cognizance of the Land Department." Again in *New Orleans* v. *Paine* (147 U. S. 261, 266), it was said and this statement was repeated with approval in *Michigan Land and Lumber Company* v. *Rust* (168 U. S. 589, 594), and *Knight* v. *Lane, supra*:

> "Until the matter is closed by final action, the proceedings of an officer of a department are as much open to review or reversal by himself, or his successor, as are the interlocutory decrees of a court open to review upon the final hearing."

Also in *Beley* v. *Napthaly* (169 U. S. 353, 364), the court said:

The fact that a decision refusing the patent was made by one Secretary of the Interior, and, upon a rehearing, a decision granting the patent was made by another Secretary of the Interior, is not material in a case like this. It is not personal but an official hearing and decision, and it is made by the Secretary of the Interior as such Secretary, and not by an individual who happens at the time to fill that office, and the application for a rehearing may be made to the successor in office of the person who made the original decision, provided it could have been made to the latter had he remained in office.

In *Knight* v. *Lane, supra*, the court had under consideration among other things the authority of the Secretary of the Interior to reconsider and vacate his former decision in the matter of a contest between the Cherokee Indians in Oklahoma over an allotment of land provided for in the act of July 1, 1902 (32 Stat. 725), the terms of which act provided for the issuance of patent for the allotment subject to the approval of the Secretary of the Interior. Sustaining the Secretary's authority to reconsider his prior decision the court said:

The question, therefore, is reduced to this: Was his power of decision exhausted when on May 10, 1909, he approved the proposed adjustment? To this there can be only a negative answer. That decision was not final, but interlocutory. In terms it shows that the patent was not to be effective or delivered until he approved it, and an act of 1902 declared that it must have his approval (Sec. 59). Not only so, but, no statutory provision opposing, effect was to be given to the regulation providing for rehearings and allowing thirty days within which to apply therefor. Thus, it was as if the decision itself had made provision for a rehearing. Proper regard must also be had for the fact that the act of April 26, 1906, 34 Stat. 137, c. 1876, Sec. 5, expressly contemplated that the title should not pass until the patent was recorded in the office of the Com-

missioner to the Five Civilized Tribes. In such a case we perceive no reason for departing from the rule applicable to kindred proceedings in the Land Department.

The court then quoted at some length from *Brown* v. *Hitchcock, supra,* and repeated "as entirely opposite" the statement reproduced above from *New Orleans* v. *Paine.*

The question was again presented to the Supreme Court in the recent case of *Wilbur* v. *United States* (281 U. S. 206). There the secretary, following an opinion given by the Solicitor for the Department, had ruled in 1919 that certain children of an enrolled mixed-blood mother were entitled to share in certain interest annuities payable to the Chippewa Indians. In 1927 a succeeding Secretary, adopting and applying an opinion given by a succeeding Solicitor, held that the children in question were not entitled to share in the interest annuities and accordingly directed that their enrollment be canceled and no further payments made to them. It was contended among other things that the decision of 1927 was void in that the then Secretary was without power to reconsider and revoke the decision of his predecessor in 1919 on the same matter. Answering this contention the Supreme Court said:

If at the time of the decision in 1927 the Secretary of the Interior was without power to reconsider and revoke the decision of 1919, it well may be that the realtors would be entitled to the relief by mandamus which they seek. But there was no such want of power. The decision in 1919 was, not a judgment pronounced in a judicial proceeding, but a ruling made by an executive officer in the exertion of administrative authority. That authority was neither exhausted nor terminated by its exertion on that occasion, but was in its nature continuing. Under it the Secretary who made the decision could reconsider the matter and revoke the decision if found wrong; and so of his successor. The latter was charged, no less than the former had been,

with the duty of supervising the payment of the interest annuities and of causing them to be distributed among those entitled to them and no others; and if he found that the individuals not so entitled were sharing in the annuities by reason of a mistaken or erroneous ruling of the former his authority to revoke that ruling and stop further payments under it was the same as if it had been his own act. The powers and duties of such an office are impersonal and unaffected by a change in the person holding it.

To the same effect is *West* v. *Standard Oil Co.*, *supra*. There the court held that the Secretary was not precluded from reopening an inquiry originally made by a former Secretary to determine whether land claimed under a school land grant to the State of California was known to be mineral when the survey was approved, saying:

If at the time of Secretary Work's order the Department still had jurisdiction of the land, he possessed the power to review the action of his predecessor and to deal with the matter as freely as he could have done if the dismissal of the proceedings had been his own act or that of a subordinate official. For, so long as the Department retains jurisdiction of the land, administrative orders concerning it are subject to revision.

Applying the foregoing principles to the facts of the case at hand, it becomes apparent that the Secretary's power of decision was not exhausted by the decision of December 10, 1928. Patent for the property purchased has not yet issued and hence the event which otherwise would have terminated the jurisdiction of the Department has not occurred. Moreover, the patent to be effective must have the approval of the Secretary and the statute expressly declares that it shall issue only when the full purchase price is paid. Payment of the purchase price in full is thus a condition which the purchaser must perform before he is entitled to patent.

The duty of determining that the condition has been met is committed by the statute to the Secretary and this necessarily includes authority to determine collateral questions such as here involved having a material bearing upon the purchaser's right to patent even though this may entail an inquiry into the correctness of previous findings upon the same matter by a former Secretary. This being so, we pass to the bearing which the administrative construction and practice of the Department should have in considering the matter anew.

It is hardly necessary to cite authorities upon the point that the long-continued, uniform construction of a statute by the administrative authorities entrusted with its execution is entitled to the greatest respect. But this rule is without application here for the reason that the departmental construction as hereinbefore pointed out has been neither uniform nor continuous and in no event can be said to have ripened into any settled practice. Under such circumstances, the courts if called upon to consider the matter would do so without regard to the departmental construction or practice, *United States* v. *Haley* (160 U. S. 136), and I see no good reason why the Department should be guided by any different rule.

This brings us to the question of whether the royalties accruing on coal mined between the dates of sale and approval belong to the Indians or the purchaser. The provisions of the act of 1918 having a particular bearing on this question read:

That the Secretary of the Interior is hereby authorized to sell the coal and asphalt deposits leased and unleased, in the segregated mineral area of the Choctaw and Chickasaw Nations, in Oklahoma, in the manner hereinafter set forth.

Before offering such coal and asphalt deposits for sale the Secretary of the Interior, under such rules and regulations as he may prescribe, shall cause the

same to be appraised. Such appraisement, both as to leased and unleased lands, shall be described in tracts to conform to the descriptions of the legal subdivisions heretofore designated by the Secretary of the Interior, and shall be completed within six months after the passage of this Act.

Sec. 2. That the sale of such deposits shall be thoroughly advertised, and shall not later than six months from the final appraisement be offered for sale to the highest bidder at public auction in tracts to conform with such appraisement at not less than the appraised value so fixed, except that isolated tracts of less than nine hundred and sixty acres may be sold separately under like provisions; Provided, That twenty per centum of the purchase price shall be paid in cash, and the remainder shall be paid in four equal annual payments from the date of the sale, and all deferred payments on all deposits sold under the provisions of this Act shall bear interest at the rate of five per centum per annum, and shall mature and become due before the expiration of four years after the date of such sale.

The regulations approved September 24, 1918, provide, among other things, for the payment of eight cents per ton on coal mined to the Superintendent for the Five Civilized Tribes to be applied on the purchase price and then declare (section 13):

All royalty paid on coal or asphalt mined subsequent to the date of approval of the sale shall belong to the purchaser, subject to the requirement of a certain amount per ton, as above stated, to be paid to the Superintendent of the Five Civilized Tribes, to be applied on the purchase price, which is to protect the Choctaw and Chickasaw Tribes from loss on account of coal removed in case the tract should be forfeited before final payment is made.

While the above statement recognizes the right of the purchaser to royalties accruing subsequent to the

date of approval of the sale, the regulations are silent as to the disposition to be made of royalties accruing prior to that time and after the date of sale. However, the advertisement containing the terms and conditions upon which the deposits would be offered for sale to the public contains the following.

All royalties on tracts now under lease, and on any lease made on tracts subsequent to the sale and before final payment, must be paid to the Superintendent for the Five Civilized Tribes and be held by him *and paid to the* purchaser after final payment has been made or in annual installments in the discretion of the Secretary of the Interior.

As the deposits were advertised for sale on December 11, 1918, the foregoing provision, which became part of the contract of sale and binding upon the parties thereto, can only mean that the royalties from and after that date belong to the purchaser, provided, of course, he completes his contract of purchase. While the express terms of the contract of purchase thus appear to determine the ownership of the royalties during the period here in question, it may be well to point out that recognition of the right in the purchaser to such royalties is in entire harmony with the act of 1918, particularly section 2 above, which in imposing the obligation upon the purchaser to pay interest on the deferred payments from the date of sale and requiring completion of the contract before the expiration of four years from the date of sale, manifests a clear intent that the sale shall become effective on that and not on some later date. True, approval of the Secretary of the Interior was essential, but in giving such approval the Secretary merely sanctioned what had already been done and the approval when given related back and took effect as of the date of sale. See *Anchor Oil Co.* v. *Gray* (257 Fed. 277), affirmed (256 U. S. 519); *Lykins* v. *McGrath* (184 U. S. 171). The purchaser then became the equitable owner of the property purchased (see *Hall* v. *Ely,* 108 Atl. 370),

with all the rights incident to such ownership, including the benefit of the royalties accruing on coal thereafter mined.

Very truly yours,

(Signed) E. C. FINNEY,
Solicitor.

Approved: November 22, 1930.

(Signed) Jos. M. DIXON,
First Assistant Secretary.